St. John's Law Review

Volume 45
Number 3 *Volume 45, March 1971, Number 3*

Article 19

December 2012

CPLR 3101: Court Recognizes That Public Policy Grounds for Restricting Disclosure in Matrimonial Actions Are No Longer Viable

St. John's Law Review

is past. We can no longer afford the time or judicial manpower for the repeated applications for the same relief which necessarily result from postponing decision."[98]

There would seem to be nothing to preclude the *East Asiatic* decision. The time-honored rule of non-inquiry into the merits of a 3025(b) motion to amend is derived strictly from the case law of the various departments of the appellate division.[99] Lacking any instruction to the contrary from the Court of Appeals, the discretion available to the court under rule 3025(b) would appear to be broad enough to include an inquiry into the merits.

ARTICLE 31 — DISCLOSURE

CPLR 3101: Court recognizes that public policy grounds for restricting disclosure in matrimonial action are no longer viable.

It had long been ruled that disclosure in matrimonial actions should be limited to cases wherein the movant demonstrated "special circumstances."[100] For, disclosure was deemed to be burdensome and it was feared that discovery proceedings would jeopardize the parties' chances for a reconciliation.[101] With the enactment of the DRL, however, and its provision for extensive conciliation proceedings,[102] it was posited that the public policy grounds for restricting the use of disclosure devices in matrimonial actions were no longer viable.[103] This approach was adopted by the Appellate Division, Fourth Department, in *Dunlap v. Dunlap*.[104]

In *Dunlap* plaintiff-wife sought to examine defendant on two claims: her cause of action for divorce based on the nonfault ground of living apart for a period of two years pursuant to a separation agreement and defendant's counterclaim based on adultery. Recognizing that the grounds for denying disclosure have been "substantially diminished," the court permitted plaintiff to examine defendant regarding her action for divorce. However, the court properly disallowed

---

98 *Id.* at 434, 312 N.Y.S.2d at 313.

99 *See* note 96 *infra*.

100 Hunter v. Hunter, 10 App. Div. 2d 291, 198 N.Y.S.2d 1008 (1st Dep't 1960); Kennedy v. Kennedy, 40 Misc. 2d 672, 243 N.Y.S.2d 737 (Sup. Ct. Kings County 1963).

101 *See, e.g.*, Campbell v. Campbell, 7 App. Div. 2d 1011, 184 N.Y.S.2d 479 (2d Dep't 1959); *see also* CARMODY-FARKOSCH, NEW YORK PRACTICE 575-76 (8th ed. 1963).

102 DRL § 215(c) *et seq.*

103 7B MCKINNEY'S CPLR 3101, commentary 15, at 18-20 (1970).

104 34 App. Div. 2d 889, 312 N.Y.S.2d 491 (4th Dep't 1970); *see also* Hochberg v. Hochberg, 63 Misc. 2d 77, 310 N.Y.S.2d 737 (Sup. Ct. Nassau County 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 356 (1970).

inquiry into the husband's counterclaim inasmuch as he was not competent to testify on that issue.[105]

Dunlap represents a marked shift in judicial attitude toward disclosure in matrimonial actions. Formerly, a demonstration of special circumstances was required in order to obtain disclosure; now, disclosure can be foreclosed only by an avowal of special circumstances. Such a construction is in accord with the general approach to disclosure under the CPLR[106] and is laudably responsive to the Court of Appeals interpretation of article 31.[107]

CPLR 3101(a)(4): Satisfaction of section 17 of Court of Claims Act automatically satisfies "special circumstances" requirement.

In *General Building Supply Corp. v. State*[108] claimant sought leave to examine the state's consultant engineer with regard to flooding on a certain highway project. In support of its motion,[109] claimant averred that the examination was material and necessary to the proper preparation for trial within the meaning of section 17 of the Court of Claims Act.[110] For, the engineer was the only person in charge of the project who had personal knowledge of events underlying its claim. Thus, claimant contended that adequate "special circumstances" as prescribed under CPLR 3101 justified the examination of the non-party witness.

In granting the motion to examine, the Court of Claims was heavily influenced by the admission of the state's own engineer at an earlier examination that he had no personal knowledge of the facts in issue since on the two crucial dates involved the consultant engineer had been in charge of the operations. Pointing out that the phrase "material and necessary" has been equated with a test of usefulness and reason,[111] the court agreed with the observation put forth by one authority that "[i]f a witness holds . . . a key, to any substantial fact involved in the case, how can any lawyer . . . be compelled to go to trial without knowing

105 CPLR 4502.

106 Under article 31, the parties are entitled, in most instances, to proceed without prior court approval. It is only when a party believes that his adversary is abusing his right to disclosure that a court takes cognizance of the proceedings under CPLR 3103's provision for a protective order.

107 *See* Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).

108 63 Misc. 2d 520, 312 N.Y.S.2d 215 (Ct. Claims 1970).

109 Disclosure by the state is governed by the same rules applicable to private parties "except that it may be obtained only by order of the court in which the action is pending and except further that it may not include interrogatories or requests for admissions," CPLR 3102(f). *See generally* 7B McKINNEY'S CPLR 3102, commentary 10, at 269-71 (1967).

110 N.Y. CT. CLAIMS ACT § 17 (McKinney 1963).

111 Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).